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COURT OF APPEAL - FOURTH APPELLATE DISTRICT
DIVISION ONE

STATE OF CALIFORNIA

In re ANTHONY PENTON

on

Habeas Corpus.

D061881

(San Diego County
Super. Ct. No. SCD147553)

Petition for writ of habeas corpus after superior court denied Penal Code section 1405 request for appointment of counsel. Timothy R. Walsh, Judge. Relief granted in part.

FACTUAL AND PROCEDURAL BACKGROUND

Anthony Penton is serving a term of 54 years 8 months in prison on a 2001 conviction for robbery, attempted robbery, false imprisonment by violence, menace, and fraud or deceit with enhancements for personal use of a weapon and prior convictions. In 2002, we affirmed the judgment on appeal with a minor modification in the sentence (*People v. Jones* (Oct. 2, 2002, D03825) [nonpub. opn.]).

On January 13, 2012, Penton submitted a request for the superior court to appoint counsel to prepare a postconviction motion for DNA testing. Consistent with Penal Code

section 1405, subdivision (b)(1),¹ Penton declared that he was not the perpetrator of the crime, DNA testing is relevant to his assertion of innocence, no attorney had been appointed under this provision in the past, and he is indigent. On February 3, while acknowledging that Penton had complied with the requirements of section 1405, subdivision (b)(1), the superior court denied the request without prejudice for the failure to comply with other prongs of the statute, including the requirement to explain why the identity of the perpetrator was or should have been a significant issue in the case. Penton sought reconsideration on February 14 but never received a response.

In this petition, Penton asserts the superior court should have granted his request for the appointment of counsel because, once he made the requisite showing under section 1405, subdivision (b)(1), the court no longer had discretion to deny the request. (*In re Kinnamon* (2005) 133 Cal.App.4th 316.) He also contends the \$12,250 the trial court imposed in 2001 as restitution is unauthorized because the award was made joint and several and it exceeded \$10,000. In response to our request for a response, the Attorney General concedes that the court should have granted Penton's request for the appointment of counsel, but takes the position that the \$12,250 constitutes direct victim restitution, which may be imposed jointly and severally and is not subject to limitation in amount.²

¹ All further statutory references are to the Penal Code.

² Penton recently asked that we require the Attorney General to re-serve the response because he has not received it and would like to file a reply. We deny the request in light of the disposition in Penton's favor.

DISCUSSION

Section 1405, subdivision (b)(1), provides: "An indigent convicted person may request appointment of counsel to prepare a motion under this section by sending a written request to the court. The request shall include the person's statement that he or she was not the perpetrator of the crime and that DNA testing is relevant to his or her assertion of innocence. The request also shall include the person's statement as to whether he or she previously has had counsel appointed under this section." The statute further requires that the court, upon finding the person is indigent and has included the information specified in subdivision (b)(1), appoint counsel to investigate and file a motion for DNA testing if appropriate, and represent the person solely for the purpose of obtaining DNA testing. (§1405, subd. (b)(3)(A).)

Although the language of section 1405 before it was amended in 2001 made it arguable whether an indigent convicted person was entitled to the appointment of counsel until he had filed a motion for DNA testing and explained in light of all the evidence how the requested testing would impeach the verdict, "[t]he language of the 2001 amendment is unambiguous." (*In re Kinnamon, supra*, 133 Cal.App.4th at pp. 320-321.) It imposes a mandatory duty on the court to appoint counsel for an indigent convicted person if the person's request includes the required information and counsel has not previously been appointed for the purpose of obtaining DNA testing. (*Id.* at p. 321.) "The required information [under section 1405, subdivision (b)(1)] does not include a theoretical or factual showing of the relevance of DNA testing. A statement that DNA testing is relevant suffices." (*In re Kinnamon, supra*, at p. 321.)

Penton's request for the appointment of counsel met the statutory criteria. In light of the Attorney General's concession that the court should have granted the request, we conclude no useful purpose could reasonably be served by issuance of an order to show cause or plenary consideration of the matter, and grant habeas relief with respect to the issue. (*People v. Romero* (1994) 8 Cal.4th 728, 740, fn. 7.) However, we deny without prejudice Penton's request for review of the \$12,250 restitution award because Penton has not demonstrated that he first filed a petition in the superior court on the issue. (*In re Steele* (2004) 32 Cal.4th 682, 692.)

DISPOSITION

Relief is granted with respect to the denial of Penton's request for the appointment of counsel. The superior court is directed to vacate its February 3, 2012 order, and enter an order under section 1405, subdivision (b)(3)(A), appointing counsel to investigate the appropriateness of DNA testing as to Penton's conviction, file a motion for DNA testing if counsel's investigation reveals testing is appropriate, and represent Penton solely for the purpose of obtaining DNA testing. In all other respects, the petition is denied.

O'ROURKE, J.

WE CONCUR:

McINTYRE, Acting P. J.

AARON, J.